Supreme Court, U.S.
FILED
APR 19 2005
OFFICE OF THE CLERK

No. 04-514

In The Supreme Court of the United States

RICKY BELL, WARDEN,

Petitioner,

v.

GREGORY THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE COURT OF APPEALS' HISTORICAL POWER TO CONTROL ITS MANDATE DOES NOT PERMIT IT TO DISREGARD THE UNAMBIGUOUS REQUIREMENTS OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Respondent argues that, despite the plain language of Rule 41(d)(2)(D), a court of appeals has broad discretion – indeed "untrammeled" authority – to control its mandate after this Court denies certiorari. However, the rules of appellate procedure, prescribed by this Court[1] and approved by Congress,[2] cannot be so easily cast aside. It bears noting at the outset that even respondent recognizes that Rule 41(d)(2)(D) requires issuance of the mandate upon receipt of this Court's order denying certiorari. Respondent interprets Rule 41(d)(2)(D) to mean that, "*if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate" (Resp. Br. 11-12, 13-14) (emphasis in original), thus limiting the rule's reach only to "cases in which the mandate has been stayed for the reason that this Court may grant certiorari." (Resp. Br. 13-14) Building on this interpretation, respondent takes

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[1] "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072.

[2] "The Supreme Court shall submit to Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." 28 U.S.C. § 2074.

two different tacks. He first suggests that the Sixth Circuit stayed or withheld its mandate for reasons unrelated to the petition for writ of certiorari, rendering the issuance requirement of Rule 41(d)(2)(D) inapplicable. Second, respondent contends that, in any event, the mandatory language of Rule 41(d)(2)(D) is really discretionary. But these contentions fail to afford respondent safe harbor because the Sixth Circuit's own orders refute the first contention, and the most basic rules of statutory construction fatally undermine the second.

A. The Sixth Circuit Did Not Stay Issuance of Its Mandate for any Reason Independent of Respondent's Petition for Writ of Certiorari; It Simply Failed to Issue It as Required by Rule 41(d)(2)(D).

Respondent repeatedly alludes to an affirmative "decision" by the Sixth Circuit to withhold issuance of its mandate for a reason independent of the certiorari petition: "After *deciding to delay* issuance of its mandate for reasons unrelated to this Court's denial of certiorari . . . " (Resp. Br. 11) (emphasis added); "there is nothing in Rule 41(d)(2)(D) addressing cases in which the court of appeals has either *stayed or withheld issuance of the mandate for reasons unrelated* to this Court's resolution of a petition for certiorari" (Resp. Br. 15) (emphasis added); "[I]f, as here, a court of appeals *decides under Rule 41(b) to withhold issuance* of its mandate for reasons having nothing to do with the disposition of a petition for a writ of certiorari before this Court, there is nothing in Rule 41(d)(2)(D) that strips the court of that power." (Resp. Br. 16-17) (emphasis added) But the Sixth Circuit's own orders conclusively refute that characterization of its behavior in this case.

In the period between the court's original judgment affirming the decision of the district court (Pet. App. 117) and the decision at issue here (Pet. App. 1), the Sixth Circuit issued only three orders: one denying rehearing, either en banc or by the original panel (Pet. App. 346); one staying issuance of the mandate "to allow [Thompson] time to file a petition for a writ of certiorari" (Pet. App. 347); and one extending the stay "to allow [Thompson] time to file a petition for rehearing from the denial of certiorari." (Pet. App. 348) The court did not enter any order before the denial of certiorari staying its mandate for any reason other than the disposition of respondent's certiorari petition, let alone for the purpose of rehearing the underlying merits of its earlier decision. *Compare First Gibralter Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (prior to denial of certiorari, mandate stayed to permit en banc poll in light of change in governing law); *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977) (mandate stayed before time for mandatory issuance under Rule 41(d)(2)(D) to permit consideration of petition for rehearing in light of change in federal statutory law). *See also Wilson v. Ozmint*, 357 F.3d 461 (4th Cir. 2004) (court entered order 22 days after entry of its opinion and judgment temporarily withholding mandate pending disposition of petition for rehearing).[3] When both of the Sixth Circuit's stay orders

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[3] None of the cases respondent cites for the proposition that a court of appeals possesses broad authority to withhold issuance of the mandate after the denial of certiorari addresses the unique comity and federalism concerns implicated in actions under 28 U.S.C. § 2254. (Resp. Br. 18) The only habeas case he cites for that proposition, *Fairchild v. Norris*, 51 F.3d 129 (8th Cir. 1995), aids the petitioner. In *Fairchild*, a pre-AEDPA habeas case, the Eighth Circuit denied the petitioner's post-certiorari motion to stay and/or recall the mandate in light of this Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995).

(Continued on following page)

expired by their own terms, the court never explained why the mandate failed to issue thereafter. It merely observed in its subsequent opinion that it had not issued: "[W]e rely on our inherent authority to reconsider our [earlier] opinion prior to issuance of the mandate, which has not yet issued in this case." (Pet. App. 6)

Although respondent recites a litany of reasons why a court of appeals "may sometimes choose to delay issuance of the mandate," *i.e.*, new evidence, clerical error, a change in governing law, the existence of a related question before the court of appeals or this Court, or a decision by the court that it "needs more time to reach the right result" (Resp. Br. 17-18), none of these circumstances was ever cited as a basis for the Sixth Circuit's stay of the mandate in this case nor offered by the court as justification for its failure to comply with Rule 41(d)(2)(D). In view of the Sixth Circuit's only statements on the subject of its mandate, respondent can only assume that the failure to issue it was the result of either of two possible causes: (1) a clerical or ministerial error by the court clerk; or (2) some private communication from the court affirmatively instructing the clerk to withhold the mandate. Under neither circumstance can the action of the court be justified. If the former, the Sixth Circuit should not be

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Contrary to respondent's assertion, the Eighth Circuit did not "rehear and vacate" its prior decision after this Court denied certiorari. *Fairchild*, 51 F.3d at 131 (ruling petitioner's "Motion for Recall of Mandate and for Rehearing is denied"). And in *Adamson v. Lewis*, 955 F.2d 614 (9th Cir. 1992), cast by respondent as merely a minority view, the court held that "[a]ny stay of mandate [after the denial of certiorari] would have to be justified upon the same grounds as would justify a recall of the mandate." *Adamson*, 955 F.2d at 620-21. (Resp. Br. 18 and n.9)

permitted to take advantage of a ministerial error in order to take action that would not have been permitted but for the error. If the latter, the Sixth Circuit's actions amount to nothing less than a calculated end-run around *Calderon* to reach an otherwise prohibited result. Neither type of manipulation should be condoned by this Court.

Moreover, even if the Court were to indulge the fiction that the Sixth Circuit was, in fact, engaged in informal "rehearing" of this case while respondent's petition for writ of certiorari was pending, non-compliance with Rule 41(d)(2)(D) still could not be justified. First, Rule 41(d)(1) only allows for an automatic stay of the mandate pending disposition of a *timely filed petition* for panel or en banc rehearing, an event which, in this case, occurred in March 2003 prior to the filing of the certiorari petition. (Pet. App. 346) That subsection is thus inapplicable here. And even if the general provision of Rule 41(b) allowing a court of appeals to "shorten or extend the time" for issuance of the mandate could be invoked in these circumstances, the language of the rule envisions that the court will issue an affirmative statement to that effect, which is obviously lacking in this case. *See also* Fed. R. App. P. 2 ("On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – *suspend any provision* of these rules in a particular case *and order proceedings as it directs*.") (emphasis added). Nor, as respondent suggests, should a litigant be required to divine a court's intentions from miscellaneous docket entries reflecting routine administrative activities of the court clerk's office, such as the transfer of an appellate record. (Resp. Br. 41) A court speaks only through its orders duly entered of record. *Transcontinental Leasing, Inc. v. Mich. Nat'l Bank Detroit*, 943 F.2d 52 (6th Cir. 1991) (where district court order

failed to extend appeal deadline, reviewing court will not infer an intent to extend from the language of a separate unrelated court order); *Murdaugh Volkswagen, Inc. v. First Nat'l Bank of S.C.*, 741 F.2d 41, 44 (4th Cir. 1984) ("basic to the operation of the judicial system is the principle that a court speaks through its orders") (citing *Rothschild & Co., Inc. v. Marshall*, 44 F.2d 546 (9th Cir. 1930)). The Sixth Circuit's orders in this case say nothing about extending the stay of the mandate for any reason or for any period beyond the disposition of respondent's certiorari petition.

In the final analysis, neither party can provide this Court with anything more than speculation as to *why* the mandate "ha[d] not yet issued" when the Sixth Circuit chose to reconsider its earlier decision. But that task ought never fall to the parties in a judicial proceeding. In the absence of an express order to the contrary, parties should be able to presume that official ministerial acts will be performed as required by law. *See, e.g., United States v. Barela*, 571 F.2d 1108 (9th Cir. 1978) (Ferguson, District Judge, dissenting) (In accordance with the equitable principle that a "court may regard as done that which should have been done," where mandate not issued in accordance with Rule 41, matter should be considered by the appellate court under the same standard justifying a recall of the mandate.); *Sherard v. Nebraska*, 509 N.W.2d 194 (Neb. 1993) ("When the record is silent on the issue, we will presume that a mandate was duly issued at the appropriate time."). *See also Jacksonville Port Authority v. Adams*, 556 F.2d 52, 56 (D.C. Cir. 1977) ("In the interest of justice, the court may proceed as if the action that should have been taken in the courthouse was timely taken."). To permit a court of appeals to act surreptitiously in the face

of the unambiguous requirements of clearly applicable rules would be detrimental to the coherence and consistency that the rules of procedure, by their nature, are designed to provide.

B. The Issuance Requirement of Rule 41(d)(2)(D) Cannot Properly Be Read As Merely Discretionary.

Respondent's reading of Rule 41(d)(2)(D) as merely discretionary is equally unsupportable. He contends that, because subsections (b) and (d)(1) of Rule 41 both contain provisions giving the court of appeals discretion to deviate from the otherwise mandatory language of those sections, subsection (d)(2)(D) must also be read to allow that same discretion. Respondent's proposed reading, however, ignores some of the most fundamental rules of statutory construction. First, and most basic, where the statutory language is unambiguous with regard to the particular dispute in the case, the inquiry of a court must cease. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997). The question whether statutory language is plain is determined by the language itself, the specific context in which it is used, and the broader context of the statute as a whole. *Robinson*, 519 U.S. at 341. Here, the language of subsection (d)(2)(D) could not be any clearer – "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed." Because the circumstances of this case fall squarely within the parameters of Rule 41(d)(2)(D), the court had no discretion to take a different course except under such extraordinary circumstances as would justify further action by the court had the rule's

requirements been satisfied through the timely issuance of the mandate. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) (rule's provision that the mandate issue on the denial of certiorari creates a "threshold requirement of exceptional circumstances before the mandate would be stayed"). That position is further buttressed by application of the principle that a specific statute, here subsection (d)(2)(D), controls over a general provision such as subsection (b), particularly when the two are interrelated and closely positioned, *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981), the specific provision qualifying and supplying exceptions to the general one. *Townsend v. Little,* 109 U.S. 504, 512 (1883). Thus, the mandatory issuance provision of section (d)(2)(D) governs under the specific circumstance of this case, where the mandate has been stayed pending the filing of a petition for writ of certiorari and for no other reason. Respondent's reliance on the general issuance provision of Rule 41(b) as the overarching guide for *when* a court of appeals must issue a mandate is misplaced. (Resp. Br. 16) As respondent himself concedes in his opening argument, "*if* the court of appeals has stayed issuance of the mandate for the reason that this Court may grant certiorari, then the clerk of a court of appeals must, upon receipt of the denial of certiorari, issue the mandate." (Resp. Br. 11)

Respondent's argument also ignores another established principle of statutory construction – that where language is included in one section of a statute but omitted in another section of the same statute, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposefully. *Russello v. United States*, 464 U.S. 16, 23 (1983). The rule's drafters clearly could have but did not confer upon the court of appeals the

discretionary authority to extend the stay of the mandate after the denial of certiorari, although such authority had been expressly provided for in other contexts in two sections of Rule 41. *See* Rule 41(b) ("The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. *The court may shorten or extend the time.*") (emphasis added); Rule 41(d)(1) ("The timely filing of a petition for panel rehearing . . . stays the mandate until disposition of the petition or motion, *unless the court orders otherwise.*") (emphasis added). (Resp. Br. 20) The omission of equivalent language in subsection (d)(2)(D) is conspicuous and, indeed, constitutes powerful circumstantial evidence of the drafters' intent that an appellate court relinquish jurisdiction of an appeal when this Court denies certiorari.

It is the duty of the lower courts to respect and adhere to the governing rule of law. Indeed, it has been said that, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." *Missouri v. Jenkins*, 515 U.S. 70, 129 (1995) (Thomas, J., concurring) (quoting The Federalist No. 78, p. 528 (J. Cooke ed. 1961)). Through its rule-making authority, this Court may regulate the exercise of jurisdiction by a federal court in any manner not inconsistent with the Constitution or laws of the United States. *Venner v. Great Northern Railway Co.*, 209 U.S. 24, 35 (1908). Thus, any historical, inherent control a court of appeals may have over the issuance of its mandate merges into the express provisions

of the rules of appellate procedure and is limited to that extent.[4] *Cf. Matter of Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988) (holding that "old inherent power" of a bankruptcy court to reconsider its final judicial orders merged into the Rules of Civil Procedure). The choice here is not, as respondent suggests, between a "holistic" reading of Rule 41 on the one hand and, on the other, an unduly restrictive reading which abrogates the court of appeals' "inherent authority." It is a choice, instead, between recognizing or ignoring what the rule provides in plain language.

C. A Court of Appeals May Not Defeat the Finality of a Judgment Affirming the Denial of Habeas Corpus Relief Merely by Retaining Its Mandate in Violation of the Rules of Appellate Procedure.

Aside from respondent's flawed statutory construction arguments, his jurisdictional arguments largely miss the point. Petitioner has never contended, nor does his argument dictate, that a court of appeals is divested of

[4] Citing Justice Harlan's dissent in *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), respondent contends that Congress' abolition of the End of Term Rule in 1948, by virtue of 28 U.S.C. § 452, left the federal courts with "untrammeled power in establishing their own rules of finality." *Ohio Power*, 353 U.S. at 103. (Resp. Br. 25) Yet the next sentence of that opinion supports petitioner's interpretation of Rule 41: "[T]he history of § 452 indicates that the courts were to have no power to re-examine their judgments otherwise than in accordance with their established rules or statutes." *Id.* Thus, even if an appellate court's power to establish its own rules of finality could be characterized as "untrammeled" following the enactment of § 452 in 1948, that power was subsequently curtailed by the enactment of the Federal Rules of Appellate Procedure, including Rule 41, which became effective July 1, 1968.

jurisdiction at the point Rule 41(d)(2)(D) requires issuance of the mandate. Rather, the mandatory language of Rule 41(d)(2)(D), triggered by the order denying certiorari, operates to limit the court's authority to reconsider its earlier decision beyond that point to those circumstances that would justify a recall of the court's mandate if it had been issued properly. The only way the Sixth Circuit was able to claim continued control over this case was by ignoring the issuance requirement of Rule 41(d)(2)(D) and retaining jurisdiction it was otherwise obligated to relinquish.

That a "mandate is effective when issued" under Rule 41(c) is no doubt true. It is, however, irrelevant to the question of finality when the mandate requires no further action in the receiving court. Until the mandate issues, any action in the *district court* is a nullity. *See, e.g., Zaklama v. Mount Sinai Medical Center,* 906 F.2d 645, 649 (11th Cir. 1990) ("[A] *district court* generally is without jurisdiction to rule in a case that is on appeal, despite a decision by this court, until the mandate has issued.") (emphasis added). However, and more to the point, the mandate of the Sixth Circuit is not directed to the State, and its issuance is not a necessary antecedent to the State's judicial processes.[5]

[5] Respondent's contention that issuance of the mandate is a necessary antecedent to a motion to set an execution date under Tennessee law is incorrect. (Resp. Br. 40-41) The Tennessee Supreme Court has never viewed the "completion of the standard three-tier appeals process" as requiring the issuance of a court of appeals' mandate, nor did respondent assert the court of appeals' failure to issue the mandate as "legal and/or factual grounds why . . . no execution date should be set" in his case. Tenn. Sup. Ct. R. 12.4(A). (Pet. App. 349-50) Moreover, contrary to respondent's suggestion, the Tennessee Supreme Court's denial of the State's motion for an execution date in *Alley v. Tennessee*, No. M1991-00019-SC-DPE-DD (Tenn., Jan. 6, 2005), was not

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Respondent's argument conflates the functions of a court's judgment with its mandate. The former adjudicates the rights of the parties; the latter is directed to the originating court, transferring jurisdiction with instructions for further proceedings. "A court of appeals' decision is 'final' from the issuance of the *judgment*, not from the issuance of the *mandate*. . . . [I]ssuance of the mandate is wholly separate from our consideration of the merits [and is] merely the formal vehicle for conveying the terms of our disposition to the District Court." *United States v. Clark*, 915 F.2d 699, 716 (D.C. Cir. 1990) (Edwards, C.J., dissenting) (emphases in original) (vacatur for mootness not required by events occurring subsequent to decision on the merits but before issuance of the mandate). Indeed, the function and effect of a mandate differ significantly depending upon the nature of the court's judgment. Where the judgment of the court calls for a remand of the cause to the trial court for further action, the judgment itself is not self-executing. Instead, it must be certified back to the district court by way of the mandate. Through the mandate, authority and jurisdiction is returned to the lower court to take such steps as are directed in the judgment. In that instance, issuance of the mandate is of institutional significance both for purposes of directing further litigation and in the allocation of jurisdiction among

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premised on the court of appeals' mandate, but instead on the potential for further review in Alley's case (through a timely petition for en banc rehearing in the Sixth Circuit) and the potential for further federal court rulings in the Rule 60(b) context "that could render ineffectual any date set." The court specifically noted the State's announcement of its intention to file a petition for writ of certiorari in *In re Abdur'Rahman*, Nos. 02-6547/6548 (6th Cir. Dec. 13, 2004) (en banc) (addressing the role of Rule 60(b) motions in the federal habeas context), which articulated the rule on which Alley's case was decided.

tribunals. *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (Just as notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.). But where, as here, an appellate court judgment simply affirms an order of dismissal, issuance of the mandate has little, if any, practical significance. *See generally State v. Miyasato*, 805 So.2d 818 (Fla. Dist. Ct. App. 2001) (discussion concerning purpose and effect of appellate court mandate).

Nor was the State barred from proceeding in the state courts on the basis of the district court's extension of its stay of execution pending appeal under 28 U.S.C. § 2251. (Resp. Br. 40-41; J.A. 88-89) When the Sixth Circuit affirmed the district court's judgment dismissing respondent's petition for writ of habeas corpus and then denied rehearing of that decision, the stay of execution dissolved by operation of law. In *Lambert v. Barrett*, 159 U.S. 660 (1895), this Court held that, when a habeas corpus appeal was dismissed, "the supersedeas fell with the disposition of the case," and when final judgment was entered, the State had the power to proceed even before the Court's mandate was properly filed with the lower federal court. *See also Jugiro v. Bush*, 140 U.S. 291, 295-96 (1891) (interpreting statute authorizing stay of State proceedings "pending appeal," Court declined to "superadd" the condition that the filing of the mandate in the circuit court, which merely affirmed its judgment refusing the writ of habeas corpus, is necessary before a State can proceed in the execution of its judgment of conviction). Were it not so, the Sixth Circuit would not have seen fit to enter *sua sponte* another stay of execution in conjunction with its second opinion withdrawing its initial judgment. (Pet. App. 6)

Likewise, petitioner's motion for reconsideration of the court's order expanding counsel's appointment to include state-court conservatorship proceedings provides no justification for the failure of the mandate to issue under Rule 41(d)(2)(D). (Resp. Br. 41-42; J.A. 7) First, the state-court proceeding at issue in that motion was separate and distinct from respondent's habeas corpus appeal, in general, or the judgment of the Sixth Circuit, in particular, and was actually concluded in October 2003 through the termination of respondent's state-court-ordered conservatorship, an occurrence specifically noted by the Tennessee Supreme Court in its May 12, 2004, decision affirming the trial court's summary dismissal of respondent's petition asserting incompetence for execution. (Pet. App. 370-71) More importantly, however, the Sixth Circuit's actions in this case cannot be justified by its failure to dispose of that motion in a timely manner.

II. THE PRINCIPLES OF COMITY AND FINALITY UNDERLYING THIS COURT'S DECISION IN *CALDERON* REQUIRE REVERSAL OF THE SIXTH CIRCUIT'S JUDGMENT.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court affirmed the general principle that a court of appeals' authority to review a state criminal judgment in a habeas corpus proceeding is limited to one round of review unless necessary to prevent a miscarriage of justice. Respondent's reading of *Calderon* as holding that a court of appeals' judgment in a habeas corpus case is not "final" until issuance of the mandate is mistaken. The only issues directly before the Court in *Calderon* involved the existence, source, and extent of a court of appeals' authority to *recall* a mandate in order to revisit the merits of an earlier decision. *Calderon*, 523 U.S. at 541. In *Calderon*, the

mandate itself, duly issued in accordance with the rules of appellate procedure, was indisputable evidence of the finality of the court's judgment. *Calderon*, 523 U.S. at 551 ("We denied Thompson's petition [for writ of certiorari] on June 2, 1997. . . . The Court of Appeals issued its mandate on June 11, 1997."). Thus, it was unnecessary for the Court in *Calderon* to address the precise finality question presented here – whether a court of appeals may fail to issue its mandate as required by law and then assert its control of the mandate as a basis to reconsider a final judgment. But the Sixth Circuit's action in this case is plainly irreconcilable with the principle underlying the decision in *Calderon*: in the federal habeas context, once a state prisoner has received a full review of his constitutional claims by a court of appeals and this Court has denied certiorari, the State's interest in "real finality" outweighs the prisoner's interest in obtaining yet another opportunity for review. *Calderon*, 523 U.S. at 557.

As in *Calderon*, the court here did not act merely to correct a clerical error in its initial judgment. The Sixth Circuit's second decision was a complete reversal of the first on the merits. Nor does this case involve any fraud upon the court. The Sixth Circuit itself rejected that notion. (Pet. App. 2) Moreover, as the panel majority plainly acknowledged, this case does not present a situation where new evidence comes to the attention of the court after entry of its initial judgment: "Reading Judge Suhrheinrich's opinion, one might conclude that this court had only recently unearthed the Sultan deposition, when in fact it was submitted to the panel prior to oral argument as part of the abeyance motion." (Pet. App. 3) Indeed, the Sultan deposition – touted by both respondent and the Sixth Circuit as being "extremely probative" and of "critical" evidentiary significance (Pet. App. 2, 9; Resp. Br. 11) –

had been before the court for *21 months* prior to entry of its initial judgment.[6] The Sixth Circuit actually noted the existence of the deposition in a footnote in its original opinion. (Pet. App. 144 n.13) And respondent quoted directly from the Sultan deposition in his petition for rehearing and suggestion for rehearing en banc, noting specifically that, within the report and deposition, "Dr. Sultan made specific findings related to Thompson's mental condition at the time of the offense." (*Thompson v. Bell*, 6th Cir. Case No. 00-5516, Petition for En Banc Rehearing, pp. 29-30, filed January 27, 2003) Despite that knowledge, the Sixth Circuit nevertheless denied rehearing on March 10, 2003. (Pet. App. 346; J.A. 6)

The court's actual justification for its surprise eleventh-hour decision is really indiscernible. Judge Suhrheinrich, who "wish[ed] it to be known that the initiative for this decision came from [his] chambers," (Pet. App. 8) asserted that the Sultan deposition came to the court's attention *after* issuance of its initial decision, thus necessitating post-judgment action: "Subsequent to the issuance of our decision on January 9, 2003, information has come to the attention of the Court which requires us to determine whether our decision to affirm the district court's denial of Thompson's petition for writ of habeas corpus relief from his death sentence was improvident." (Pet. App. 7-8) However, assuming that this assertion refers to the Sultan deposition, both the majority opinion and the record conclusively refute it. And it is impossible to

[6] The Sultan deposition initially came before the Sixth Circuit on March 2, 2001, as an attachment in support of a motion to hold the appeal in abeyance pending disposition in the district court of a motion under Fed. R. Civ. P. 60(b), which the Sixth Circuit denied on March 21, 2001. (J.A. 5)

reconcile with footnote 13 of the court's earlier opinion (also authored by Judge Suhrheinrich), which specifically referred to the Sultan deposition in its discussion of respondent's Rule 60(b) motion in the district court (Pet. App. 144 n.13), and footnote 10 of the second opinion (Pet. App. 55 n.10), noting that the Sultan deposition was attached to respondent's contemporaneous motion to hold his appeal in abeyance pending disposition of the Rule 60(b) motion.[7]

The court's analysis of the probative value of the Sultan deposition is equally muddled. Although both the majority and concurring opinions point to Dr. Sultan's opinion concerning respondent's "mental state at the time of the crime" as critical to the court's disposition of the case (Pet. App. 2, 7), neither ultimately faults trial counsel for failing to present *that* evidence at sentencing. In fact, neither the majority nor the concurring opinion questions the state court's conclusion that counsel's trial strategy regarding the presentation of mental health evidence was entirely reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984). That is hardly surprising given the fact that respondent had undergone a thirty-day mental health evaluation prior to trial at Middle Tennessee Mental Health Institute, which resulted in a finding of "no mental illness, mental defect, or insanity," and respondent did not even receive a pre-trial diagnosis of mental illness from

[7] Judge Suhrheinrich takes issue with the majority's concession regarding the availability of the Sultan deposition by arguing that it had not been "properly placed" before the court prior to issuance of its initial decision, thus precluding exercise of the court's "equitable powers" at that time. (Pet. App. 114) The obvious flaw in that reasoning is that the court of appeals lacked any justification for considering the Sultan deposition on either occasion.

his own mental health expert. (Pet. App. 158) As the state court reasonably concluded, "counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion," a finding that was duly noted in the Sixth Circuit's initial opinion. (Pet. App. 164) Rather, Judge Suhrheinrich faults counsel's failure to present a complete *social and family history* of the respondent for use in mitigation. (Pet. App. 85-86) But the three individuals cited by Judge Suhrheinrich as providing the most critical background information – Maybelle Lamar (respondent's grandmother), Nora Jean Hall Wharton (respondent's sister), and Arlene Cajulao (respondent's former girlfriend) – actually testified at respondent's capital sentencing hearing in 1985. (R.1, Add. 1H, Vol. 17, pp. 73-100; Vol. 18, pp. 2-32, 50-97)

Ultimately, however, Judge Suhrheinrich did not condemn the state court's denial of post-conviction relief based upon any supposed deficiency in the state court's assessment of counsel's performance in light of this Court's precedent but upon an alleged deficiency in the state post-conviction process itself, a basis that is not even cognizable in federal habeas proceedings – "the state court postconviction courts' denial of funds amounted to an objectively unreasonable application of *Strickland* under 28 U.S.C. § 2254(d)(1)." (Pet. App. 89) *See Pennsylvania v. Finley*, 481 U.S. 551, 558-59 (1987) (Any claim of error arising out of state post-conviction review is a matter for state, rather than federal court, determination.). In fact, none of the members of the panel below attempts to explain how consideration of the Sultan deposition could possibly have defeated summary dismissal of respondent's federal habeas petition even if it had properly been presented to the district court.

In short, the Sixth Circuit's rationale for its actions in this case is untenable under any of the various theories advanced by either the majority or concurring opinions. Under any standard, those actions would constitute a grave abuse of discretion. This case simply does not present a situation in which a court of appeals has properly exercised its rehearing authority under Rules 35 or 40 or has stayed its mandate prior to the denial of certiorari for some other legitimate reason. Rather, the Sixth Circuit's actions in this case call to mind the concern voiced by Justice Harlan in his dissenting opinion in *Ohio Power*: "I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court." 353 U.S. at 111.

III. REMAND TO THE SIXTH CIRCUIT IS UNNECESSARY BECAUSE THE EVIDENCE ON WHICH ITS DECISION IS BASED IS INSUFFICIENT AS A MATTER OF LAW TO DEMONSTRATE A MISCARRIAGE OF JUSTICE SO AS TO JUSTIFY A SECOND ROUND OF HABEAS REVIEW.

Respondent argues that, even if this Court concludes that *Calderon* applies, it should remand the case to the Sixth Circuit either for application of the *Calderon* standard or to determine whether a fraud has been committed on the court. (Resp. Br. 49) The latter option has already been foreclosed by the panel decision specifically rejecting the minority position urging intervention on grounds of a fraud upon the court. (Pet. App. 2, 82, 89-107) Respondent did not cross-petition for certiorari review of that decision,

and he is now barred from challenging it. Sup. Ct. Rules 12 and 13. As to application of the *Calderon* standard, nothing will be gained by remanding this case to the court of appeals with instructions for the court to perform the analysis it should have performed in the first place because the evidence is insufficient as a matter of law to demonstrate a miscarriage of justice. (Br. 35-43) All that a remand for further consideration will accomplish is additional needless delay and yet another unjustified obstacle to the State's ability to execute its lawful judgment.

CONCLUSION

For the reasons stated, the Sixth Circuit's judgment should be reversed.

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